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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TONY ODELL OLIVER, Defendant and Appellant.	B301487 (Los Angeles County Super. Ct. No. MA067514)

APPEAL from an order of the Superior Court of Los Angeles County. Charles A. Chung, Judge. Affirmed.

Joy A. Maulitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Michael R. Johnsen and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Tony Odell Oliver appeals from a trial court order denying his petition to dismiss his conviction for possessing marijuana in prison in violation of Penal Code section 4573.6. Because the trial court properly denied his petition pursuant to Health and Safety Code section 11362.45, subdivision (d),[1] we affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2015, defendant was in state prison serving a sentence for second degree robbery. On January 6, 2015, defendant was searched in his prison cell and two bindles with 1.5 grams of marijuana were found on his person. He was charged with possession of marijuana in jail, and on February 9, 2016, he pled no contest to violating Penal Code section 4573.6 and admitted a prior strike conviction. He was sentenced to the low term of two years, doubled for the strike, for a total of four years in state prison. Various fines and fees were also imposed.

On June 28, 2019, defendant filed a petition seeking resentencing or dismissal of his conviction pursuant to Proposition 64 (§ 11361.8). Relying upon *People v. Raybon* (2019) 36 Cal.App.5th 111 (*Raybon*), review granted Aug. 21, 2019, S256978, he argued that because possession of less than an ounce of cannabis is no longer a felony, his cannabis conviction must be dismissed.

The trial court denied the petition on September 6, 2019, noting: "The court has read and considered the *Raybon* and [*People v. Perry* (2019) 32 Cal.App.5th 885 (*Perry*), review denied June 12, 2019,] rulings and finds that the rulings on the cases

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[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

conflict with one another. In the court's analysis, the court is persuaded by the ruling in *Perry* and therefore, denies the petition for resentencing without prejudice."

Defendant timely filed a notice of appeal from the trial court's order.

DISCUSSION

Defendant argues that his conviction for possessing marijuana in prison in violation of Penal Code section 4573.6 should have been dismissed because Proposition 64 legalized possession of marijuana for the general public and did not specifically except possession by prisoners from its legalization provision.

The issue of whether Proposition 64 decriminalized the possession of cannabis in prison or jail is currently pending before the California Supreme Court. In *Raybon*, *supra*, 36 Cal.App.5th 111, the Third District held that possession of less than one once of cannabis in prison is no longer a crime under Penal Code section 4573.6 after the passage of Proposition 64. (*Raybon*, *supra*, at pp. 119, 126.) However, the First District in *Perry*, *supra*, 32 Cal.App.5th 885, concluded that possession of cannabis in prison remains a crime under Penal Code section 4573.6 after the passage of Proposition 64. (*Perry*, *supra*, at p. 887; see also *People v. Whalum* (2020) 50 Cal.App.5th 1, 3 (*Whalum*), review granted Aug. 12, 2020, S262935 [Fourth District concluding "that the crime of possessing unauthorized cannabis in prison in violation of Penal Code section 4573.8 was not affected by Proposition 64"].) As explained below, we agree with those courts that have determined that possession of cannabis in prison or jail remains a crime after the passage of Proposition 64.

I. *The prohibition on cannabis possession in prison or jail prior to Proposition 64*

Defendant was convicted under Penal Code section 4573.6, subdivision (a). This subdivision provides: "Any person who knowingly has in his or her possession in any state prison, . . . or in any county . . . jail, . . . any controlled substances, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code, . . . or paraphernalia intended to be used for unlawfully injecting or consuming controlled substances, without being authorized to so possess the same by the rules of the Department of Corrections, rules of the prison or jail, . . . or by the specific authorization of the warden, superintendent, jailer, or other person in charge of the prison, [or] jail, . . . is guilty of a felony . . . ."

"Division 10 of the Health and Safety Code comprises the California Uniform Controlled Substances Act. (Health & Saf. Code, § 11000 et seq.) Chapter 2 contains schedules listing controlled substances subject to the provisions of division 10, and chapter 6 describes the offenses associated with controlled substances." (*People v. Fenton* (1993) 20 Cal.App.4th 965, 968 (*Fenton*).) Cannabis is listed in Schedule I. (§ 11054, subd. (d)(13).) Prior to the passage of Proposition 64, possession of nonmedical cannabis was generally prohibited. (Former § 11357, as amended by initiative measure (Prop. 47, § 12, approved Nov. 4, 2014, eff. Nov. 5, 2014).)

Penal Code section 4573.6, the offense of which defendant was convicted, appears in part 3, title 5 of the Penal Code, concerning "Offenses Relating to Prisons and Prisoners." (See Pen. Code, § 4500 et seq.) Penal Code "section 4573.6 appears to be aimed at problems of prison administration." (*People v.*

Rouser (1997) 59 Cal.App.4th 1065, 1071.) "[S]everal adjacent provisions place restrictions on possessing and importing drugs and other contraband in custody. [Citations.]" (*People v. Low* (2010) 49 Cal.4th 372, 382 (*Low*); see Pen. Code, §§ 4573, subd. (a) [bringing controlled substances into prison or jail], 4573.5 [bringing alcoholic beverages, drugs other than controlled substances, or drug paraphernalia into prison or jail], 4573.8 [possessing alcoholic beverages, drugs, or drug paraphernalia in prison or jail], 4573.9, subd. (a) [selling or furnishing controlled substances to any person held in prison or jail], 4574, subd. (a) [bringing firearms, deadly weapons, or explosives into prison or jail].) These laws "flow from the assumption that drugs, weapons, and other contraband promote disruptive and violent acts in custody, including gang involvement in the drug trade." (*Low*, *supra*, at p. 388.) The Legislature was also concerned about drug use by prisoners. (*People v. Gutierrez* (1997) 52 Cal.App.4th 380, 386.) "Hence, these provisions are viewed as "'prophylactic'" measures that attack the "'very presence'" of such items in the penal system. [Citations.]" (*Low*, *supra*, at p. 388.)

II. *Proposition 64*

In 2016, voters enacted Proposition 64, known as the Control, Regulate and Tax Adult Use of Marijuana Act (the Act or Proposition 64). (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 64, § 1, p. 178 (Voter Information Guide).) Prior to Proposition 64's passage, medical use of marijuana was legal under California law, but nonmedical use was illegal. (See Voter Information Guide, text of Prop. 64, § 2 subd. B, p. 178.) The stated purpose of Proposition 64 was "to establish a comprehensive system to legalize, control and regulate the cultivation, processing, manufacture, distribution, testing, and

sale of nonmedical marijuana, including marijuana products, for use by adults 21 years and older, and to tax the commercial growth and retail sale of marijuana." (*Id.*, text of Prop. 64, § 3, p. 179.) The intent of the Act included "[p]ermit[ting] adults 21 years and older to use, possess, purchase and grow nonmedical marijuana within defined limits for use by adults 21 years and older as set forth in [the Act]." (*Id.*, text of Prop. 64, § 3, subd. (*l*), p. 179.)

As is relevant here, Proposition 64 added section 11362.1 to the Health and Safety Code. This statute generally allows the possession, smoking, and ingestion of cannabis, as well as the cultivation of cannabis plants. Section 11362.1, subdivision (a), provides: "Subject to Sections 11362.2, 11362.3, 11362.4, and 11362.45, but notwithstanding any other provision of law, it shall be lawful under state and local law, and shall not be a violation of state or local law, for persons 21 years of age or older to: [¶] (1) Possess . . . not more than 28.5 grams of cannabis not in the form of concentrated cannabis; [¶] (2) Possess . . . not more than eight grams of cannabis in the form of concentrated cannabis, including as contained in cannabis products; [¶] (3) Possess, plant, cultivate, harvest, dry, or process not more than six living cannabis plants and process the cannabis product by the plant; [¶] (4) Smoke or ingest cannabis or cannabis products; and [¶] (5) Possess, . . . use, . . . or give away cannabis accessories to persons 21 years of age or older without any compensation whatsoever." (§ 11362.1, subd. (a).)

The phrase "notwithstanding any other provision of law" in section 11362.1, subdivision (a), signals an intent for the statute to prevail over all contrary law. (See *In re Greg F.* (2012) 55 Cal.4th 393, 406.) However, section 11362.1, subdivision (a), also

provides that a person's ability to possess, smoke, or ingest cannabis is "[s]ubject to Sections 11362.2, 11362.3, 11362.4, and 11362.45." Under these provisions, it remains illegal, for example, to possess cannabis on school grounds. (§ 11362.3, subd. (a)(5); see § 11357, subd. (c).) There are also limitations on the personal cultivation of cannabis plants (§ 11362.2) and smoking cannabis in a public place or while driving (§ 11362.3). (See § 11362.4 [setting forth the penalties for certain violations of §§ 11362.2 & 11362.3].)

Relevant here, section 11362.45 provides that certain categories of laws are unaffected by Proposition 64's legalization of cannabis. In particular, section 11362.45 provides: "Section 11362.1 does not amend, repeal, affect, restrict, or preempt . . . [¶] . . . [¶] (d) Laws pertaining to smoking or ingesting cannabis or cannabis products on the grounds of, or within, any facility or institution under the jurisdiction of the Department of Corrections and Rehabilitation or the Division of Juvenile Justice, or on the grounds of, or within, any other facility or institution referenced in Section 4573 of the Penal Code." (§ 11362.45, subd. (d).) The facilities referenced in Penal Code section 4573 include state prisons and county jails. (Pen. Code, § 4573, subd. (a).)

III. *Rules of statutory construction*

The question in this case is whether Penal Code section 4573.6, subdivision (a), is a "[l]aw[] pertaining to smoking or ingesting cannabis" in jail within the meaning of section 11362.45, subdivision (d). If so, then Proposition 64 did "not amend, repeal, affect, restrict, or preempt" Penal Code section 4573.6, subdivision (a), and possession of cannabis in jail remains a crime under that Penal Code provision.

This issue requires us to construe the phrase "[l]aws pertaining to smoking or ingesting" cannabis in section 11362.45, subdivision (d), as enacted by Proposition 64. "'In interpreting a voter initiative . . . , we apply the same principles that govern statutory construction.' [Citation.] Where a law is adopted by the voters, 'their intent governs.' [Citation.] In determining that intent, 'we turn first to the language of the statute, giving the words their ordinary meaning.' [Citation.] But the statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme. [Citation.] We apply a presumption, as we similarly do with regard to the Legislature, that the voters, in adopting an initiative, did so being 'aware of existing laws at the time the initiative was enacted.' [Citation.]" (*People v. Buycks* (2018) 5 Cal.5th 857, 879–880.) "'Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.' [Citation.] Where there is ambiguity in the language of the measure, '[b]allot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure.' [Citation.]" (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037.)

IV. *Analysis*

Proposition 64's legalization of cannabis "does not amend, repeal, affect, restrict, or preempt" "[l]aws pertaining to smoking or ingesting" cannabis in prison or jail. (§ 11362.45, subd. (d).) For the following reasons, we determine that possession of cannabis in jail under Penal Code section 4573.6, subdivision (a),

is a "[l]aw[] pertaining to smoking or ingesting" cannabis in prison or jail under section 11362.45, subdivision (d).

First, although Penal Code section 4573.6, subdivision (a), prohibits "possession" of controlled substances in a penal institution and does not expressly address smoking or ingesting such substances, section 11362.45, subdivision (d), carves out from Proposition 64's legalization of cannabis "[l]aws pertaining to smoking or ingesting" cannabis in a penal institution. (§ 11362.45, subd. (d).) "Definitions of the term 'pertain' demonstrate its wide reach: It means 'to belong as an attribute, feature, or function' [citation], 'to have reference or relation; relate' [citation], '[b]e appropriate, related, or applicable to' [citation]." (*Perry*, *supra*, 32 Cal.App.5th at p. 891.) As the appellate court stated in *Perry*, in view of the "wide reach" of the phrase "'pertaining to,'" "[w]e would be hard pressed to conclude that possession of cannabis is unrelated to smoking or ingesting the substance." (*Ibid.*; accord, *Whalum*, *supra*, 50 Cal.App.5th at pp. 11–12; contra, *Raybon*, *supra*, 36 Cal.App.5th at pp. 121–122 ["'pertaining to'" smoking or ingesting cannabis includes "various forms of consumption" but not the "distinct activity" of possession].) Indeed, "[i]n the context of possession in prison, it is particularly obvious that possession must 'pertain' to smoking or ingesting. For what purpose would an inmate possess cannabis that was not meant to be smoked or ingested by anyone?" (*Perry*, *supra*, at p. 892.)

Second, the three preceding subdivisions—(a), (b), and (c)—of section 11362.45 carve out from Proposition 64's legalization of cannabis certain laws "making it unlawful to," for example, drive while impaired by cannabis, or laws "prohibiting," for example, the sale of cannabis. In subdivision (d), "the drafters of

Proposition 64 easily could have, but did not, use the phrase 'laws *prohibiting* smoking or ingesting cannabis' in a correctional institution or 'laws *making it unlawful* to smoke or ingest cannabis' in a correctional institution, which would have tracked the language in the three preceding carve outs. Instead, section 11362.45, subdivision (d) uses the term 'pertaining to,' signaling an intent to broadly encompass laws that have only *a relation to* smoking or ingesting cannabis in a correctional institution, rather than strictly limiting the carve out to laws that 'prohibit' or 'make unlawful' the act of smoking or ingesting cannabis." (*Whalum*, *supra*, 50 Cal.App.5th at p. 12.)

Third, it is significant that defendant has cited no law that expressly provides that it is a crime to smoke or ingest cannabis in prison or jail. (See *Whalum*, *supra*, 50 Cal.App.5th at p. 6 ["We are unaware of any statute that explicitly states that it is a crime to use cannabis in prison"].) Rather, as set forth above, the preexisting statutory scheme takes a """prophylactic""" approach to "attack the "'very presence"' of [certain] items in the penal system" by prohibiting the possession and the bringing, furnishing or selling of alcohol, drugs, controlled substances, and/or paraphernalia in prisons and jails. (*Low*, *supra*, 49 Cal.4th at p. 388; see Pen. Code, §§ 4573, subd. (a), 4573.5, 4573.6, 4573.8, 4573.9, subd. (a).) Consequently, in order for section 11362.45, subdivision (d), to have any meaning in view of the preexisting statutory scheme, section 11362.45, subdivision (d), must be construed as having a broader application than to just a law that expressly prohibits the smoking or ingesting of cannabis in prison or jail, as no such law exists.

In this context, and in view of the wide application of section 11362.45, subdivision (d), with its "pertaining to"

language, the only reasonable construction of section 11362.45, subdivision (d)'s carve out is that it encompasses a law "pertaining to smoking or ingesting" cannabis in prison or jail, such as Penal Code section 4573.6's prohibition on the possession of controlled substances in prison or jail. (See *Whalum*, *supra*, 50 Cal.App.5th at p. 13.)

We find defendant's arguments to the contrary unpersuasive. For example, defendant contends that if section 11362.45, subdivision (d), was intended to apply to possession of cannabis, it could have expressly stated so, as Proposition 64 expressly refers to possession in other provisions. (See, e.g., §§ 11362.1, subd. (a)(1), (2), (3) & (5), 11362.3, subd. (a)(4) & (5), 11362.45, subd. (f).) Defendant similarly argues that if section 11362.45, subdivision (d), was intended to apply more broadly beyond smoking or ingesting, it could have used the phrase "pertaining to marijuana," as reflected in another part of Proposition 64. (See, e.g., Voter Information Guide, text of Prop. 64, § 3, subd. (r), p. 180 [intent in enacting Proposition 64 included to "[a]llow public and private employers to enact and enforce workplace policies pertaining to marijuana"].) As we have explained, however, given the broad reach of the phrase "pertaining to" and the absence of a law expressly making it a crime to smoke or ingest cannabis in prison or jail, the only reasonable construction of the carve out described in section 11362.45, subdivision (d), is that it encompasses the possession of cannabis in prison or jail.

Defendant also argues that the text of Proposition 64 and the Voter Information Guide reflect the voters' intent to decriminalize possession of a small amount of cannabis even in prison or jail. However, other than the text of section 11362.45,

subdivision (d), itself, nothing in Proposition 64 or the Voter Information Guide addressed the issue of cannabis in prison or jail. "Thus, there is nothing in the ballot materials for Proposition 64 to suggest the voters were alerted to or aware of any potential impact of the measure on cannabis in correctional institutions, much less that the voters intended to alter existing proscriptions against the possession or use of cannabis in those institutions." (*Perry*, *supra*, 32 Cal.App.5th at p. 895; see also *Whalum*, *supra*, 50 Cal.App.5th at pp. 14–15.) To the contrary, "[i]t is apparent that Proposition 64, in sections 11362.1 and 11362.45, was intended to maintain the status quo with respect to the legal status of cannabis in prison." (*Perry*, *supra*, at pp. 892–893.) In other words, while attitudes towards marijuana may have shifted significantly since the prison contraband statutes were enacted, attitudes towards drugs in prison have not.

Defendant further contends that because possession of a small amount of cannabis is no longer prohibited under section 11357, it is no longer a crime to possess cannabis in prison or jail under Penal Code section 4573.6, because the latter statute is dependent on the former. He argues that his interpretation "aligns with the analysis" in *Fenton*, *supra*, 20 Cal.App.4th 965.

In *Fenton*, the defendant was convicted of violating Penal Code section 4573, which prohibits bringing into a jail "any controlled substance, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code." (Pen. Code, § 4573, subd. (a); see *Fenton*, *supra*, 20 Cal.App.4th at p. 966.) Section 11350, subdivision (a), prohibits possession of specified controlled substances "unless upon the written prescription of a physician." The *Fenton* court concluded

that the defendant had not violated Penal Code section 4573 because he had a physician's prescription. (*Fenton*, *supra*, at pp. 966–967, 971.) The appellate court explained that "the reference [in Penal Code section 4573] to division 10 must include the prescription exception because [Penal Code] section 4573 imports the prohibition against possession of controlled substances not the list of controlled substances. Thus, the 'plain meaning' of the statute is that one may bring controlled substances into a penal institution if an exception contained in division 10 applies. Here, one does. Health and Safety Code section 11350 does not prohibit possession of a controlled substance with a prescription." (*Fenton*, at p. 969.)

In this case, defendant contends that he similarly did not violate Penal Code section 4573.6, which prohibits possession in jail of "any controlled substances, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code," because after Proposition 64, the possession of a small amount of cannabis is no longer prohibited by section 11357. We are not convinced. As explained in *Perry*, "the *Fenton* court simply interpreted Penal Code section 4573 as 'permit[ting] controlled substances to be in penal institutions under proper circumstances.' (*Fenton*, *supra*, 20 Cal.App.4th at p. 969.) This interpretation did not conflict with any other provision of law." (*Perry*, *supra*, 32 Cal.App.5th at p. 894.)

In the case before us, however, "a conclusion that division 10 does not prohibit the possession of not more than 28.5 grams of cannabis for purposes of Penal Code section 4573.6 would make meaningless the express provision of Proposition 64 that its legalization of cannabis did not 'amend, repeal, affect, restrict, or preempt: [¶] . . . [¶] . . . . [l]aws pertaining to smoking or

ingesting cannabis' in penal institutions. (§ 11362.45, subd. (d).)" (*Perry*, *supra*, 32 Cal.App.5th at p. 894.) Although "the definition of in-custody offenses in Penal Code section 4573.6 . . . by reference to possession prohibited by division 10 has become more complicated since Proposition 64 with respect to cannabis, a matter that might warrant Legislative attention" (*Perry*, *supra*, at pp. 895–896, fn. omitted), we believe that based on the broad language of section 11362.45, subdivision (d), coupled with the statutory scheme with its """prophylactic"" measures that attack the """very presence""" of drugs and other contraband in custody (*Low*, *supra*, 49 Cal.4th at p. 388), possession of cannabis in prison or jail remains a crime under Penal Code section 4573.6, subdivision (a).

Defendant was therefore properly convicted of violating Penal Code section 4573.6, subdivision (a), for possession of cannabis in prison, and the trial court rightly denied his petition to dismiss that conviction. It follows that the concomitant order imposing fines and fees stands.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT